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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

RONALD ASH,

Defendant and Appellant.

B206325

(Los Angeles County
Super. Ct. No. NA074507)

APPEAL from a judgment of the Superior Court of Los Angeles County. James B. Pierce, Judge. Affirmed.

Alex N. Coolman, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews and David F. Glassman, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Ronald Ash of assault by means likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)). The jury also found true an allegation that Ash inflicted great bodily injury on the victim (Pen. Code, § 12022.7, subd. (a)). Ash admitted a prior strike—a juvenile adjudication under Penal Code section 288, subdivision (b)(1) (Pen. Code, § 1170.12, subds. (a)-(d), § 667, subds. (b)-(i)). The trial court sentenced Ash to state prison for an aggregate term of nine years comprised of: the midterm of three years, doubled to six years for the prior strike, plus an additional three years for the great bodily injury enhancement. On appeal, Ash asserts there was insufficient evidence that he inflicted great bodily injury and that he was the perpetrator. He further claims the court’s use of a prior juvenile adjudication as a strike violated his Sixth Amendment rights and the eyewitness identification was unduly suggestive. We affirm the conviction.

FACTUAL AND PROCEDURAL BACKGROUND

We review the evidence in accordance with the usual rules on appeal. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054 (*Kraft*).) On May 6, 2007, Javier Alcazar was visiting his mother at her home in Long Beach. Alcazar had recently painted over graffiti that had been sprayed on the alley-facing wall of the house. On May 6, around 5:45 p.m., Alcazar was in the garage when he heard the sound of spray painting. He looked out a window and saw several young African-American men in the alley. He then saw one of the men walking away from the wall with a can of spray paint in his hand.

Alcazar went into the alley and asked, “Are you guys spray painting the wall?” He was looking at the man carrying the spray paint can. Ash approached Alcazar and responded: “Are you talking to me, cuz? Are you saying I’m spray painting your wall, cuz?” Alcazar told Ash to get away from him. Ash then punched Alcazar on the side of his head. Alcazar had not been looking at Ash directly as he approached, but once Ash punched, Alcazar turned and saw him. When Alcazar started to hit back, several other men jumped in and began punching Alcazar. Ash grabbed Alcazar in a headlock, swung him around, punched him in the face, and broke his nose. Alcazar’s nose began to bleed and he fell to the ground. The men continued to punch and kick Alcazar. Alcazar got up

and went back to his mother's gate and garage. Ash was still chasing and punching Alcazar. When Alcazar got inside of the gate, the men ran back towards the alley.

At around that point, Alcazar's sister arrived in a car. As she parked, she saw several African-American men get into a red Impala and drive away. She heard a comment from the men that sounded like "I'm hurt," or "it hurts." She noticed Alcazar standing by the gate. When she got closer she saw that he was battered and bleeding. Around ten days later, Alcazar's sister was again at her mother's home when she saw the red Impala. She alerted one of Alcazar's other sisters, who then drove by and recorded the Impala's license plate number.

On May 17, 2007, Alcazar met with police. A detective showed him three photographic lineups. Each lineup contained six photographs.¹ From the photographs, Alcazar identified three men in the lineups that he recognized from the incident, including Ash. Without any hesitation, Alcazar told the detective that Ash was the person who punched him first and started the incident. Alcazar also identified Ash at the preliminary hearing.

On January 16, 2008, a few days before the trial, Alcazar met with the detective and a deputy district attorney. While the deputy district attorney was flipping through the case files, Alcazar pointed to the photograph of another man he previously identified as involved in the incident—not Ash—and stated that this was the person who had first punched him. The detective closed the file and asked Alcazar about the details of the entire incident from beginning to end. When they re-opened the file and pulled out the photographs, Alcazar pointed to Ash's picture and said: "I was mistaken. This is the guy

¹ Before showing Alcazar any photographs, the detective read him the following admonition: "You are asked to view a group of photographs. Prior to viewing these photographs I wish . . . to inform you of the following. The fact that these photographs are being shown to you should not influence your judgment. You should not conclude or guess that these photographs contain a picture of the person or persons who committed the crime. You are not obligated to identify anyone. It is just as important to exonerate the innocent as it is to identify a suspect not only to prevent miscarriages of justice, but also to enable apprehension of the person or persons who committed the crime."

that started the whole thing. The other kid was involved, but this was the guy that started the whole thing. It's been a long time.”

During the trial, Alcazar identified Ash in court as the person who confronted him in the alley and threw the first punches.

Defense Evidence

Ash testified on his own behalf as did his girlfriend and another female friend. According to all three, on May 6, 2007, they went to Ash's grandmother's house in Long Beach for a barbecue in the middle of the afternoon. Ash and his girlfriend went inside to talk to his grandmother, but otherwise the two women stayed in Ash's Impala while he talked with family. Ash had a beer. The three returned to the girlfriend's house and stayed there for the rest of the afternoon and evening.

After being advised of and waiving his rights, Ash admitted that he had suffered a prior juvenile conviction in October 2001. The jury found Ash guilty of assault by means likely to inflict great bodily injury. It additionally found that Ash had personally inflicted great bodily injury upon Alcazar.

DISCUSSION

I. Juvenile Adjudication as a Strike

Ash contends that the doubling of his sentence under the “Three Strikes” law was error because he did not have the right to a jury trial on his prior juvenile adjudication. For the reasons stated in *People v. Del Rio* (2008) 165 Cal.App.4th 439, 441, *People v. Smith* (2003) 110 Cal.App.4th 1072, 1075-1079, and *People v. Bowden* (2002) 102 Cal.App.4th 387, 391-394, we disagree. We recognize that this issue is currently pending in our Supreme Court. (See *People v. Nguyen* (2007) 152 Cal.App.4th 1205, review granted Oct. 10, 2007, S154847.) Unless directed otherwise, we follow the rule that a juvenile adjudication may be used as a strike for purposes of sentencing.

II. Sufficient Evidence Supported the Judgment

Ash contends that his conviction was not supported by sufficient evidence in two ways. First, he argues that there was insufficient evidence to prove that he inflicted great bodily injury. He also claims that there was insufficient evidence to support Alcazar's

eyewitness identification of him. Viewing the evidence in the light most favorable to the judgment, as we must (*People v. Mincey* (1992) 2 Cal.4th 408, 432), we reject his arguments.

A. Great Bodily Injury

Ash contends that there was insufficient evidence to establish the infliction of great bodily injury because the prosecution did not introduce any medical evidence other than Alcazar's testimony about his injuries and the medical treatment he received. However " '[i]t is well settled that the determination of great bodily injury is essentially a question of fact, not of law. " 'Whether the harm resulting to the victim . . . constitutes great bodily injury is a question of fact for the jury. [Citation.] If there is sufficient evidence to sustain the jury's finding of great bodily injury, we are bound to accept it, even though the circumstances might reasonably be reconciled with a contrary finding.' " ' [Citation.]" (*People v. Mendias* (1993) 17 Cal.App.4th 195, 205, citing *People v. Escobar* (1992) 3 Cal.4th 740, 750 (*Escobar*).) Great bodily injury is a "significant or substantial physical injury." (Pen. Code, § 12022.7, subd. (f); *Escobar*, *supra*, at p. 746.)

No one specific type of evidence must be admitted to allow the jury to find the defendant inflicted great bodily injury upon a victim. For example, in *People v. Lopez* (1986) 176 Cal.App.3d 460, the defendant shot one victim in the right hip cheek and shot another victim in her left leg. (*Id.* at p. 462.) The bullet penetrated the second victim's leg and exited her thigh. (*Ibid.*) The first victim did not feel pain from the bullet, and the second victim indicated only that she felt "fire" in her leg. (*Ibid.*) There was no evidence that either victim sought or received medical treatment. (*Id.* at p. 463, fn. 5). The *Lopez* court upheld a finding of great bodily injury. (*Id.* at p. 465; cf. *People v. Cross* (2008) 45 Cal.4th 58, 65-66 [medical complications are not necessary to support a finding of great bodily injury].)

Here, Alcazar testified that Ash repeatedly punched him in the face, and further that Ash broke and bloodied his nose. Alcazar also testified that Ash and others punched him all over and kicked him. Alcazar reported that he consulted a doctor who confirmed

that his nose was broken, but told him that he would have to wait until the swelling went down before his nose could be fixed. Alcazar told the jury that he had trouble breathing, and that his vision was at times blurry after the incident. The jury also saw photographs reflecting Alcazar's injuries immediately after the beating. Alcazar identified himself in the photographs and said that they illustrated his bloody and swollen face, and his broken nose.

Alcazar's testimony and the photographs reflecting his injuries were more than sufficient to support the jury's finding that the injuries were significant or substantial, and greater than minor or moderate. (See CALCRIM No. 3160; *Escobar, supra*, 3 Cal.4th at pp. 746, 750, 752.)

B. Eyewitness Identification

Ash contends that the identification procedure the detective used was unfairly suggestive or unreliable. He asserts that there was therefore insufficient evidence for the jury to conclude that he was involved in Alcazar's beating. We disagree.

Alcazar testified that he saw Ash as he was punching him. Alcazar identified Ash three times before trial, and he identified Ash once again at trial. Alcazar's sister testified she saw men jump into Ash's car and drive away immediately after the beating. No more was needed for the jury to conclude that Ash initiated and participated in the assault. (*People v. Young* (2005) 34 Cal.4th 1149, 1181 [testimony of a single witness is sufficient to support a conviction unless the testimony is physically impossible or inherently improbable].)

Ash asserts that because Alcazar was temporarily confused about Ash's role in the incident when he met with the detective and deputy district attorney on January 16, 2008, there was insufficient evidence for the jury to conclude that Ash was in fact involved in the assault. To the extent that Alcazar's recollection about Ash's exact role in the beating was inconsistent, we construe conflicts in the evidence in favor of the judgment. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357; *Kraft, supra*, 23 Cal.4th at pp. 1053-1504.) Based on Alcazar's testimony about the incident, his first two pre-trial identifications of

Ash, and the explanation of his confusion on January 16, the jury could reasonably conclude that Ash assaulted Alcazar.

Ash further contends that the detective “coached” Alcazar on January 16, causing Alcazar’s identification of Ash to be unreliable. In support of this argument, Ash cites case law in which courts considered whether a defendant’s federal constitutional right to due process was violated when a pre-trial identification procedure was unduly suggestive. In these cases, the defendant argued that either a subsequent in-court identification of the defendant was based on the earlier improper identification, or that evidence of the suggestive pre-trial identification was improperly admitted at trial. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 989 (*Cunningham*); *People v. Ochoa* (1998) 19 Cal.4th 353, 411-413 (*Ochoa*); *People v. Blair* (1979) 25 Cal.3d 640, 658-664.) Here, Ash does not explicitly assert that Alcazar’s in-court identification of him at trial was tainted by the earlier “improper” identification, or that evidence concerning any pre-trial identification should have been excluded. Even if he did, we note that Ash failed to object at trial that any pre-trial identification procedure was unduly suggestive or unreliable. As a result, he forfeited this argument. (*Cunningham, supra*, 25 Cal.4th at p. 989; *People v. Medina* (1995) 11 Cal.4th 694, 753.)

III. The Eyewitness Identification Was Not Unduly Suggestive

Finally, although we believe this issue has been waived for failure to raise it at the trial court level, the evidence did not indicate that police used an unduly suggestive technique in procuring Alcazar’s identification of Ash. Indeed, Ash has no complaints about the first two times Alcazar identified him: in the first photographic lineup less than two weeks after the beating, and at the preliminary hearing. Instead, Ash’s complaint came from the third “identification” that occurred only a few days before trial. The record does not suggest that the detective was even asking Alcazar to identify Ash at that meeting. But when Alcazar pointed to the photograph of another man involved in the incident and described him as the one who started the fight, the detective did nothing more than talk through the entire incident with Alcazar. Alcazar then, apparently entirely on his own, re-identified Ash as the man who had initiated the beating. This was not

unduly suggestive. There is no indication that the detective did anything that caused Ash “ ‘to “stand out” . . . in a way that would suggest [Alcazar] should select him.’ [Citation.]” (*Cunningham, supra*, 25 Cal.4th at p. 990.)

Further, even were we to construe this interaction as a suggestive “identification,” we would conclude that it was reliable under the totality of the circumstances. (*People v. Carter* (2005) 36 Cal.4th 1114, 1162.) Alcazar twice identified Ash prior to the challenged interaction with the detective and district attorney. Each time, Alcazar identified Ash without hesitation and with certainty. Alcazar also had ample opportunity to see Ash up close and face-to-face during the beating. (*People v. Kennedy* (2005) 36 Cal.4th 595, 610.) The defendant bears the burden of proving that an identification procedure was unreliable. (*Cunningham, supra*, 25 Cal.4th at p. 989; *Ochoa, supra*, 19 Cal.4th at p. 412.) He has not done so.

DISPOSITION

The judgment is affirmed.

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BIGELOW, J.

We concur:

RUBIN , Acting P. J.

FLIER, J.